SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1968

No. 892

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BLACK UNITY LEAGUE OF KENTUCKY, LOUISVILLE PEACE COUNCIL, SOUTHERN CONFERENCE EDUCATIONAL FUND, SOUTERN SEMINARY STUDENTS AFFILIATED WITH THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, STUDENT NON-VIOLENT COORDINATING COMMITTEE, WEST END COMMUNITY COUNCIL, WHITE EMERGENCY SUPPORT TEAM,

Appellants,

- against -

STATE SENATOR SCOTT MILLER, JR., Chairman and Member of Kentucky Un-American Activities Committee, STATE SENATOR CARL HADDEN, STATE SENATOR CLIFFORD LATTA, STATE SENATOR CHARLES UPTON, STATE SENATOR LAWRENCE W. WETHERBY, STATE REPRESENTATIVE LLOYD CLAPP, STATE REPRESENTATIVE HAROLD DEMARCUS, STATE REPRESENTATIVE THERON KESSINGER, STATE REPRESENTATIVE GEORGE MASSEY, and STATE REPRESENTATIVE FRED MORGAN, Members of Kentucky Un-American Activities Committee,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY,
LOUISVILLE DIVISION

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1968

No.

BLACK UNITY LEAGUE OF KENTUCKY, LOUISVILLE PEACE COUNCIL, SOUTHERN CONFERENCE EDUCATIONAL FUND, SOUTHERN SEMINARY STUDENTS AFFILIATED WITH THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, STEERING COMMITTEE AGAINST REPRESSION, STUDENT NON-VIOLENT COORDINATING COMMITTEE, WEST END COMMUNITY COUNCIL, WHITE EMERGENCY SUPPORT TEAM,

Appellants,

- against -

STATE SENATOR SCOTT MILLER, JR., Chairman and Member of Kentucky Un-American Activities Committee, STATE SENATOR CARL HADDEN, STATE SENATOR CLIFFORD LATTA, STATE SENATOR CHARLES UPTON, STATE SENATOR LAWRENCE W. WETHERBY, STATE REPRESENTATIVE LLOYD CLAPP, STATE REPRESENTATIVE HAROLD DEMARCUS, STATE REPRESENTATIVE THERON KESSINGER, STATE REPRESENTATIVE GEORGE MASSEY, STATE REPRESENTATIVE FRED MORGAN, Members of Kentucky Un-American Activities Committee,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION

JURISDICTIONAL STATEMENT

The Opinion Below

On October 4, 1968, the statutory three-judge Federal District Court entered a final order denying plaintiffs' motion for emergency relief. The order is not reported and is set forth as Appendix A (1a). On September 4, 1968, the Court, without holding a hearing and without giving the plaintiffs the opportunity to present legal arguments and evidence in support of their claim for relief, entered an order dismissing the action. That order likewise is not reported and is set forth as Appendix B (6a).

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

1. This is a class action, brought pursuant to 28 U.S.C. §§ 2281, 2284, seeking injunctive and declaratory relief to prevent interference with rights of the plaintiffs, protected by the Constitution of the United States, most particularly the First and Fourteenth Amendments, but including also rights protected by the Fourth, Fifth, Sixth, Ninth, Tenth, Thirteenth, and Fifteenth Amendments. The essential contention of the plaintiffs is that such rights are threatened with irreparable injury, as a result of the state legislative act establishing the Kentucky Un-American Activities Committee and by the actions of said Committee directed toward the plaintiffs, their affiliates, members and supporters, and against other organizations and individuals similarly situated.

2. The original order of the three-judge federal District Court, dismissing the plaintiffs' action, was rendered on September 4, 1968. The order of said Court denying plaintiffs' motion for emergency relief was dated October 4; 1968, and entered on October 10, 1968. Notice of appeal to this Court was duly filed on November 4, 1968, with the United States District Court for the Western District of Kentucky.

3. Jurisdiction of the appeal is conferred by 28 U.S.C. § 1253.

4. Cases sustaining the jurisdiction of this Court are: Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73 (1960); Zemel v. Rusk, 381 U.S. 1 (1965); Bibb County Board of Education v. United States, 389 U.S. 215 (1967); Sterling v. Constantin, 287 U.S. 378 (1932); Lee v. Bickel, 292 U.S. 415 (1934).

5. The proceedings involve a challenge to the validity of House Resolution No. 84, a Concurrent Resolution enacted by the General Assembly of Kentucky during its 1968 legislative session, Acts of the General Assembly of Kentucky, Chapter 237, p. 902, the Resolution adopted by the Kentucky Un-American Activities Committee on June 21, 1968 (not officially reported), and the Rules of Procedure adopted by said Committee on June 21, 1968 (not officially reported). The statutory provisions are lengthy, and their pertinent text is set forth as Appendices C through E (9a-39a).

Questions Presented by the Appeal

1. Whether plaintiffs were entitled to a hearing before a three-judge federal District Court, convened pursuant to 28 U.S.C. §§ 2281, 2284, on their

complaint alleging that a state legislative act establishing a Joint Legislative Committee on Un-American Activities and the resolution and rules of procedure adopted by the Committee pursuant to said act, both on their face and as applied to the plaintiffs and the class they represent, are violative of the Constitution of the United States?

2. Whether the federal District Court should have abstained and dismissed the suit on the ground that plaintiffs were first required to exhaust state remedies before seeking relief against the violation of rights protected by the Constitution of the United States in the federal courts?

3. Whether said legislative act and the resolution and rules of procedure adopted by the Committee are void on their face in that:

(a) Because of the vagueness and overbreadth of their provisions, they inhibit and deter the exercise of the rights of freedom of speech, press, assembly, association and petition in violation of the First and Fourteenth Amendments, and bring within the scope of legislative inquiry constitutionally protected activity;

(b) They violate the fundamental guarantees of due process of law contained in the Fifth and Fourteenth Amendments in that their provisions are vague and indefinite and fail to meet the requirement of certainty in legislative acts that are subject to enforcement by criminal sanctions;

(c) Purport to authorize such a sweeping, unlimited and all-inclusive

compulsory examination of witnesses in the protected areas of speech, press, assembly, association and petition that they violate the procedural requirements of due process contained in the Fifth and Fourteenth Amendments;

(d) Violate the fundamental right of citizens to the privacy of their political beliefs, opinions and associations guaranteed by the First, Fourth, Ninth and Tenth Amendments;

(e) Authorize the Committee to go beyond the scope of legitimate legislative inquiry into areas previously pre-empted by the government of the United States, thereby invading the exclusive province of the federal government?

4. Whether the plaintiffs, their

affiliates, members, supporters and the classes that they represent would suffer serious, immediate and irreparable injury if the federal District Court failed to grant the relief requested and whether other remedies would be adequate to prevent the claimed interference with rights protected by the Constitution of the United States?

Statement of the Case

The plaintiffs are private organizations working to bring about social change in American society within the framework of the law. In varying degrees all carry on their activities in the Commonwealth of Kentucky and the City of Louisville. The defendants are the duly appointed members of the Kentucky

Un-American Activities Committee, a joint legislative investigating committee established by the General Assembly of Kentucky during its 1968 legislative session. The mandate of the Committee is contained in the authorizing resolution, which is set forth as Appendix C (9a-19a). Essentially it is to investigate "subversive groups and persons who under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies." On June 21, 1968 the Committee adopted Rules of Procedure and a Resolution defining "violence, riots, civil disorders and activities disruptive of domestic tranquility" as Un-

American activities, which the Committee would investigate. The pertinent text of said resolution and rules of procedure is set forth as Appendices D and E (20a-39a).

In may, 1968, the City of Louisville suffered serious civil disorders in the West End of the city, a predominantly Negro neighborhood. All of the plaintiff organizations, in one way or another, had been working to redress the wrongs suffered by persons of the Negro race in American society and were so identified in the eyes of public officials of the City of Louisville. On June 19, 1968, the June Grand Jury for Jefferson County, which includes the City of Louisville, issued a report calling upon the Kentucky Un-American Activities Committee to investigate the Louisville civil disorders. Specific reference in the report

was made to plaintiff, Black Unity League of Kentucky, to a "certain west end organization sponsoring a student council at a local high school," and to other unnamed organizations which allegedly constituted a part of the "third party element that continuously rears its head at every disruption." The same day the Commonwealth's Attorney of Jefferson County said that his office had information on certain individuals and groups which he would turn over to the Committee. The only individuals named were Carl and Anne Braden, Executive Directors of plaintiff Southern Conference Educational Fund and their "associates." The organizations named by the Commonwealth's Attorney included plaintiffs Southern Conference Educational Fund, West End Community Council,

Louisville Peace Council, Black Unity League of Kentucky, Student Non-Violent Coordinating Committee, Southern Seminary Students affiliated with Southern Christian Leadership Conference, Steering Committee Against Repression and White Emergency Support Team. A newspaper account of the Grand Jury report and the Commonwealth's Attorney's statement is set forth as Appendix F (40a). On June 21, 1968, the Committee announced that it would conduct an investigation into the Louisville civil disorders. The facts set forth in this paragraph would have been introduced into evidence if the Court had ordered a hearing in this case.

On July 10, 1968, the plaintiffs filed suit in the United States District Court for the Western District of

Kentucky, seeking injunctive and declaratory relief against the actions of the Kentucky Un-American Activities Committee, which, it was alleged, would interfere with the constitutional rights of the plaintiffs, their affiliates, members and supporters and other organizations and individuals similarly situated. It was alleged that the legislative act establishing the Committee, the Committee's resolution of June 21, 1968, and the Committee's rules of procedure were, on their face, and as applied to the plaintiffs and the classes they represented, in violation of the Constitution of the United States. It was also alleged that the planned investigation into the Louisville civil disorders and other actions of the Committee were being undertaken solely for the

purpose of embarrassing, harassing and intimidating the plaintiffs and their members and other organizations and individuals having similar objectives, to prevent them from exercising their constitutionally-protected rights of expression, association, petition and the like. Threats to utilize the criminal and contempt law of the Commonwealth of Kentucky against the plaintiffs and others were also alleged. The essence of the plaintiffs' complaint was that the acts under which the Committee was operating were void on their face and that, in any event, the Committee intended to use its investigatory powers to prevent the plaintiffs and similar groups and individuals from working for peaceful social change within the framework of

the law. Since the suit sought an injunction against state officers to restrain the enforcement of a state statute on the grounds of repugnancy to the federal Constitution, plaintiffs in their complaint moved for the convention of a statutory three-judge court pursuant to 28 U.S.C. § 2284.

The District Judge to whom the case was assigned did not set a hearing on plaintiff's request for the convention of a three-judge court. Instead, and without notice to the parties, he advised the Chief Judge of the United States Court of Appeals for the Sixth Circuit of the necessity for the convention of a three-judge court, and such a court was duly convened on July 16, 1968. The parties were not advised that a three-judge court had been

constituted. On July 26, 1968, defendants filed a motion to dismiss the complaint on the ground of lack of jurisdiction. Plaintiffs, anticipating that the Court would first set a hearing on their request for the convention of a three-judge court and would hear the defendant's motion to dismiss, if at all, at that time, did not then respond to said motion. On September 4, 1968, the three-judge court entered an Order and Memorandum, abstaining from invoking its equitable jurisdiction and dismissing further proceedings until the plaintiffs had exhausted state remedies. Plaintiffs, seeking a hearing before the three-judge court and the opportunity to present legal argument and evidence in support of their claim for relief, filed a motion for emergency

relief on September 23, 1968, which was denied on October 4, 1968.

The Committee held its first hearings on the Louisville civil disorders in Frankfort, Kentucky on September 24-25, 1968. On November 14, 1968, Carl Braden, the Executive Director of plaintiff Southern Conference Educational Fund, Sam Hawkins, an official of plaintiff Black Unity League of Kentucky, and Robert Sims Kuyu, also an official of the League, were advised by the counsel of the Committee that "they were mentioned in those hearings and that they had the right to appear before the Committee." The letter to Mr. Braden is set forth as Appendix G. (42a).

Statement of the Reasons Why the Questions Presented Are So Substantial as to Require Plenary Consideration

The case presents substantial questions concerning the power of a three-judge to dispose of a case involving constitutional questions without a hearing, and concerning the applicability of the principles of Dombrowski v. Pfister 380 U.S. 479 (1965), to injunctions against the operations of state legislative investigating committees.

A. The plaintiffs were entitled to a hearing before the three-judge court on their complaint alleging that the state legislative act establishing an Un-American Activities Committee and the resolution and rules of procedure adopted by the Committee violated their constitutional rights, and that the investigations of the Committee were for the purpose of inhibiting the plaintiffs in the exercise of their constitutional rights.

The action of the three-judge federal District Court in dismissing the case without giving a hearing to the parties and without even notifying them that a three-judge court had been convened is, to say the least, most extraordinary. The Order and Memorandum of October 4, 1968, cites no cases where such a procedure was employed. The Court stated that the plaintiffs should have asked for such a hearing, but at the time of the Order plaintiffs were not even aware that a three-judge court had been convened. Moreover, on August 23, 1968, the defendants moved the Court to assign the case for a hearing on their motion to dismiss for want of jurisdiction. Plaintiffs assumed that a hearing would be granted in course, and the fact that plaintiffs chose not to file a written

response to the motion to dismiss did not, of course, mean that they conceded the validity of the motion. Plaintiffs were entitled to assume that at some time they would have the opportunity for a hearing. Moreover, the Court, in its memorandum opinion, never dealt with the contentions of the plaintiffs that the investigations were being undertaken for the purpose of harassment and intimidation. Even if the state enactment were not void on its face, where state officials employ facially valid laws for the purpose of harassing persons and inhibiting them in the exercise of constitutional rights, federal intervention against such conduct is mandated. Dombrowski v. Pfister, 380 U.S. 479 (1965); Cameron v. Johnson, 389 U.S. 809 (1968). The bad

faith of the state officials in acting under facially valid laws can only be determined by an evidentiary hearing, as was recognized by this Court in Cameron v. Johnson, supra. This fact alone required an evidentiary hearing in the case at bar and rendered improper the Court's order of dismissal without said hearing.

More importantly, the right of a litigant to be heard is one of the fundamental rights of due process of law and a denial of that right has been held to require the invalidation of judicial action. See Reynolds v. Cochran, 365 U.S. 525 (1961); Hovey v. Elliott, 167 U.S. 409 (1897). As this Court observed in Powell v. Alabama, 287 U.S. 45, 69 (1932), "If in any case, civil or criminal, a state or federal

court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." In the case at bar the three-judge federal District Court could not doubt that the plaintiffs, who had filed a suit raising significant constitutional questions, and who were asserting that the actions of a state legislative investigating committee inhibited their ability to carry on activities of free expression, wished to be heard before their suit was summarily dismissed. Instead the Court proceeded secretly, rendering their decision before the plaintiffs even knew that the statutory three-judge

court had been convened. Surely, this is not what is embodied in the concept of due process of law.

The extraordinary action of the Court below in dismissing a constitutional case without a hearing is almost completely unprecedented. The one reported case in which this was done is Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir., 1964). There the Court at least ordered a hearing, but dismissed the complaint when the individual plaintiffs failed to appear, although counsel appeared on their behalf. The Court of Appeals reversed the decision, observing:

> "The dismissal of the complaint for failure to state a claim was, as has been stated, without a hearing and without an opportunity to be heard. The right of a litigant to

be heard is one of the fundamental rights of due process of law. A denial of that right requires a reversal." 339 F.2d at 900-901.

The question of whether the Court below erred in dismissing the plaintiff's suit without a hearing is plainly substantial.

B. The Court below should not have abstained and dismissed the suit on the ground that the plaintiffs were first required to exhaust state remedies before seeking relief against the violation of rights protected by the Constitution of the United States in the federal courts.

Federal courts do not abstain from pssing on the constitutionality of state enactments so that the state courts may have the "privilege" of

declaring the state enactment unconstitutional. The federal courts have the duty to hear federal constitutional claims, and escape from that duty is not permissible merely because state courts also have the duty to protect federal constitutional rights. Zwickler v. Koota, 389 U.S. 241, 248 (1967). The federal court may abstain only in narrowly limited "special circumstances," and in constitutional cases this is only where the state statute is susceptible to a construction by the state courts that would avoid or modify the constitutional question. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959); Zwickler v. Koota, supra. See also Musser v. Utah, 333 U.S. 95 (1948). Where the contention is that the statute is violative of First Amendment rights because

of vagueness or overbreadth, and the statute cannot be rehabilitated by a narrowing construction in a single proceeding, abstention is plainly improper. Baggett v. Bullitt, 377 U.S. 360 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965). As this Court observed in Zwickler v. Koota, supra, at p. 252:

> "In such a case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

The vagueness and overbreadth of the state enactments involved in the case at bar is such that no narrowing construction is conceivably possible.

Secondly, the plaintiffs allege that

the state enactments, even if constitutional on their face, are being used for the purpose of intimidating and harassing the plaintiffs and inhibiting them from the exercise of their First Amendment rights. If this contention is sustained, federal injunctive relief must be granted. The matter of the good faith of the state officials in acting under the enactment must be determined as a preliminary matter. This being so, the abstention doctrine is completely inapplicable, and the federal court must take jurisdiction in order to determine if the state officials are acting for the purpose of intimidating, harassing and inhibiting the plaintiffs. Cameron v. Johnson; 389 U.S. 809 (1968).

This Court must determine, once and

for all, whether abstention is proper in a "Dombrowski" suit. The clear intimation of Zwickler v. Koota, supra, and Cameron v. Johnson, supra, is that it is not, but in the case at bar, the three-judge federal District Court applied the doctrine once again to bar the assertion of federal constitutional rights in a federal court.

C. The state legislative act establishing the Kentucky Un-American Activities Committee and the resolution and rules of procedure adopted by the Committee pursuant to that act are void on their face as violative of the Constitution of the United States, most particularly the First and Fourteenth Amendments, and as invading areas previously preempted by the federal government.

The "void on its face" doctrine is applicable to enactments establishing state legislative investigating committees and to resolutions and rules of procedure adopted by such committees, since the "vice of vagueness" is not confined to criminal statutes. Watkins v. United States, 354 U.S. 178, 209 (1957); N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963). When a state legislative investigating committee is authorized, as is this one, to conduct a sweeping investigation into areas of activity protected by the First Amendment, persons will necessarily be inhibited in the exercise of First Amendment rights for fear that the Committee will consider such exercise "Un-American." The Committee is directed to investigate "subversive groups and persons," and, as is well

known, "subversive" can be "equated with almost any unpopular activity, a considerable part of which may not be forbidden by law." See the discussion in Liveright v. Joint Committee of General Assembly of Tennessee, 279 F. Supp. 205 (M.D. Tenn., 1968), where the Court enjoined the operations of a legislative investigating committee authorized to investigate the"subversive activities" of a particular organization. The dangers of vagueness and overbreadth inherent in the word "subversive" have been pointed out repeatedly by this Court. See the discussion in Keyshian v. Board of Regents, 385 U.S. 539, 601-604 (1967). It is the concept of "subversion" which forms the essence of the Committee's mandate, and this in itself makes the enactment unconstitutionally vague and overbroad.

Perhaps even broader than the concept of "subversion," if this is possible, is that portion of the mandate directing the Committee to investigate "all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States, and to all persons who belong to or are affiliated with such groups or organizations." It may be asked whether the reference to "dominated or controlled by a power" means dominated or controlled by an idea or an ideology or by a specific foreign government. Presumably any group that is advocating socialism would be a group seeking to "impose a foreign political ideology." In fact, a group suggesting that the United States adopt the parlia-

mentary form of government as opposed to the presidential system could be "seeking to impose a foreign ideology." The opportunities for the Committee to investigate ideas, beliefs and associations under this mandate are endless, and such ideas, beliefs and associations under this mandate are endless, and such ideas, beliefs and associations may be exposed without reference to any legitimate legislative purpose. The Committee is clearly authorized to make the kind of sweeping inquiry condemned by this Court in cases such as DeGregory v. Attorney-General of New Hampshire, 383 U.S. 825 (1966), and Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). There can be no doubt that such a sweeping authorization will necessarily create an impermissible

chilling effect upon the exercise of First Amendment rights by groups such as the plaintiffs, which are working to bring about social change, and if past history is any guide, are likely to be labelled as "subversive" and "Un-American."

Moreover, the Committee is directed to look into the activities of groups or organizations "which have as their objectives the overthrow of the Commonwealth of Kentucky or of the United States by force, violence or other unlawful means." This authorizes an investigation into an area where the state clearly cannot legislate, i.e. subversion against the federal government. Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497 (1956). Nor is the power to investigate limited to that narrow area of subversive action

against a state, such as sabotage, assassination and the like, which the federal government has not pre-empted. Uphaus v. Wyman, 360 U.S. 72 (1959). C.f. McSurely v. Ratliff, 282 F.Supp. 848 (E.D.Ky., 1967). To allow the Committee to investigate into areas legislatively pre-empted by the federal government will seriously interfere with the administration of the federal program, and for this reason as well, the state enactment is unconstitutional.

D. The plaintiffs, their affiliates, members and the classes they represent will suffer serious, immediate and irreparable injury if the federal court fails to grant the relief requested.

Dombrowski v. Pfister, 380 U.S. 479 (1965), holds that when a state legisla-

tive enactment is attacked on its face as vague and overbroad in violation of the First Amendment, other remedies available to the assailant are necessarily inadequate. The existence of the enactment itself creates the impermissible chilling effect on the exercise of the assailant's First Amendment rights and he is entitled to relief against such interference, which can only be obtained by the Court's enjoining any activity by governmental officials pursuant to the enactment. This is but another illustration of the extent to which this Court has gone to protect the preferred freedoms of the First Amendment from the inhibiting effect created by the existence of vague and overbroad state legislation. C.f. Thornhill v. Alabama, 310 U.S. 88 (1940); Winters v. New York,

333 U.S. 507 (1948). Irreparable injury and the inadequacy of other remedies are assumed whenever a state legislative enactment is attacked on its face as violative of First Amendment rights.

Even if the legislative enactment were not void on its face, the allegations that legislative investigations were being undertaken for the purpose of intimidating and harassing the plaintiffs and inhibiting the exercise of their First Amendment rights would render other remedies inadequate. In this respect the relief is sought against a course of conduct, and the only remedy to prevent the continuation of such conduct is that of an injunction. On this basis federal and state courts have always enjoined the institution of criminal prosecutions where such prosecutions

were employed or threatened for the purpose of inhibiting the exercise of constitutional rights. See Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946); Beeler v. Smith, 40 F.Supp. 139 (E.D.Ky., 1941); Denton v. City of Carollton, 235 F.2d 481 (5th Cir., 1956). But the principle is not limited to injunctions against criminal prosecutions. The threatened injury is caused by the scheme of harassment, and such harassment can only be prevented by injunctive relief. Since the plaintiff is entitled to resort to a federal forum for the protection of federal constitutional rights, Zwickler v. Koota, 389 U.S. 241, 248 (1967), and since other remedies are inadequate to prevent this interference, the plaintiffs are deemed to suffer irreparable injury if

the federal court will not grant injunctive relief against a scheme of harassment designed to inhibit them in the exercise of constitutional rights. Dombrowski v. Pfister, supra; Cameron v. Johnson, 389 U.S. 809 (1968).

Conclusion

For the reasons aforesaid, it is submitted that the Court should note probable jurisdiction upon the appeal filed herein.

Respectfully submitted,

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APPENDIX A

Order and Memorandum of the United States District Court for the Western District of Kentucky at Louisville

(Filed---October 10, 1968)

Gordon, District Judge. Plaintiffs herein have filed a document styled "Motion For Emergency Relief", together with supporting memorandum somewhat truculent in tone. The motion does not qualify as a motion for new trial, nor as a motion to alter or amend a judgment under Rule 59 FRCP; nor does it allege any of the grounds necessary under Rule 60 FRCP; we find no reason therein justifying relief from the operation of our order of dismissal under Rule 60(b)(6) FRCP. The thrust of the "Motion For Emergency Relief" asserts that plaintiffs were "not afforded any opportunity whatsoever to present legal argument

to this Court in oral or written form". Such assertion is completely without factual support. On July 26, 1968, defendants filed with this Court a motion to dismiss and a memorandum in support thereof, together with certification that copies were mailed to the plaintiffs' attorneys. No response to this motion to dismiss was ever filed by the plaintiffs, nor was notice ever served by the plaintiff requesting an oral hearing before this Court.

Rule 5(a) of the Rules of the United States District Court for the Western District of Kentucky provides in pertinent part:

> "Response to any motion shall be in similar form and shall be filed with the clerk not later than five days from receipt of notice of the motion at which time the motion shall stand submitted.

Appendix A

Failure to respond may be good grounds for sustaining the motion."

On September 4, 1968, we entered an order and memorandum abstaining from invoking this Court's equity jurisdiction in the instant case and dismissing further proceedings until adequate and available state remedies had been exhausted.

The Court views with reproof the plaintiffs' further unsupported allegation that "this Court lacks jurisdiction to dismiss the Complaint for failure to state a claim upon which relief can be granted without at least giving plaintiffs an opportunity to be heard"[1], when in fact the plaintiffs were afforded the

[1]Plaintiffs' Exhibit "A", Council of Federated Organizations v. Mize, 339 F.2d 898, is not in point.

uniform time period in which to respond to the defendants' motion and to request hearing. The plaintiffs' failure to respond at any time, whether voluntary or inadvertent, does not now constitute ground for vacation of our order.

Plaintiffs' counsel further gnaws on our judicial patience with the assertion that the cases relied upon and cited by us in our memorandum and order are totally inapplicable, both factually and legally to the issue. Suffice it to say:

> "No man 'ere felt the halter draw with good opinion of the law."

The passions of advocacy are often difficult of suppression; however, difference of opinion with the Court as to the applicability of judicial pronouncements is the stuff of which law suits

are made and is a matter for appellate determination. We believe the cases cited by us in our memorandum and order of September 4th are applicable and controlling.

Let the motion for emergency relief be overruled.

Dated: October 4, 1968

JAMES F. GORDON
United States District Judge

Approved:

BERT T. COMBS
United States Circuit Judge

HENRY L. BROOKS
United States District Judge

APPENDIX B

Order and Memorandum of the United States District Court for the Western District of Kentucky at Louisville

(Filed---September 4, 1968)

This matter comes on the motion of defendants to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. This Court having duly considered the motion and being sufficiently advised without the necessity of hearing upon the matter, orders that the motion to dismiss be and the same is hereby sustained.

It is a well established principle, certainly in instances where there has been no federal pre-emption, that "the federal courts should not adjudicate the constitutionality of state

enactments...until the state courts have been afforded a reasonable opportunity to pass upon them". Harrison v. N.A.A.C.P., 360 U.S. 167, 176. In the instant case this Court must abstain from invoking its equity jurisdiction and suspend further proceedings until adequate and readily available state remedies are exhausted, since the state enactment involved is not, on its face, unconstitutional and since there have been no prosecutions and no sanctions levied against plaintiffs whereby irreparable injury will result to plaintiffs from our failure to act. See Dubois Clubs v. Clark, 389 U.S. 309.

Accordingly, IT IS HEREBY ORDERED AND DIRECTED that this action be and the same is hereby dismissed.

Dated: September 4, 1968

BERT T. COMBS
United States Circuit Judge

HENRY L. BROOKS
United States District Judge

JAMES F. GORDON
United States District Judge

APPENDIX C

House Resolution No. 84 of the General Assembly of Kentucky

A CONCURRENT RESOLUTION creating a Joint Legislative Committee on Un-American Activities.

WHEREAS, this state and this country face grave public danger from enemies both within and without our boundaries, and

WHEREAS, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, and

WHEREAS, Kentucky, as one of the laboratories of this great country, may study profitably this problem within

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its boundaries and enact remedial legislation if facts therefor are made available, and

WHEREAS, necessary and desirable legislation to meet this grave problem and to assist local enforcement officers to be effective must be based on a thorough and impartial investigation by a competent and active legislative committee.

NOW, THEREFORE,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky, the Senate concurring therein:

Section 1. That there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appoin-

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ted by Governor from the membership of the House and five to be appointed by the Governor from the membership of the Senate, three of the five members from each House to be of the majority party and two of the five members from each House to be of the minority party. Said committee shall study, analyze and investigate all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the Commonwealth of Kentucky, or of the United States by force, violence or other unlawful means; to all

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organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing

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upon or relating to the subject of this resolution.

Section 2. That the Committee shall have the authority to:

(a) Select a chairman and a vice chairman from its membership; and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) Contact and deal with such other agencies, public or private, as it may deem necessary for the rendition and affording of such services, facilities, studies, and reports as will best enable the committee to carry out the purposes for which it is created.

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(c) Cooperate with and secure the cooperation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of this resolution.

(d) Cooperate with and meet with similar committees of other states and of the Federal Government, or representatives thereof, outside of this state, and expenses necessarily incurred in connection therewith by any of the members or staff of the committee, thereunto duly authorized by the chairman, shall constitute a proper charge against the sums allocated to the committee,

(e) Do any and all other things necessary or convenient to

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enable it fully and adequately to exercise its powers, perform its duties, and accomplish the objects and purposes of this resolution, and,

(f) Adopt and from time to time amend such rules governing its procedure as may appear appropriate.

Section 3. That every department, commission, board, agency, officer and employee of the State Government of Kentucky and of any political subdivision, county, city or public district of or in this state, shall furnish the committee and any subcommittee, upon request, any such information, records, and documents as the Committee or subcommittee deems proper

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for the accomplishment of the purposes for which the committee is created; provided, however, that this provision shall not extend to, nor shall it be construed to make available to the Committee or any subcommittee thereof, any record or other document which under law is made a confidential record.

Section 4. That the Committee shall have the power and authority to hold hearings at any place in Kentucky which meetings may be public or private, to subpoena witnesses, administer oaths, require the production of books and records pertinent to any inquiry before the Committee and to do all other things necessary to accomplish

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the purposes of this resolution.

Section 5. That the Committee shall have authority to apply to any court of competent jurisdiction for enforcement of any order issued by it for the production of books, records, or other documents or to compel the attendance of any witnesses subpoenaed to appear before it and, upon request of the Committee, the Attorney General shall prosecute any witness who is guilty of refusal to testify or of giving false testimony shall be punished in accordance with the criminal laws of this state relating to false swearing or perjury, as the case may be, and

Section 6. That the Committee

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shall submit its findings and recommendations to the General Assembly at each of its regular sessions and at such other times as the Committee may deem necessary and desirable.

Section 7. That the members of the Committee created herein shall serve without compensation but shall receive the same per diem and travel allowance in the performance of their duties as is provided for members of the General Assembly.

Section 8. That the per diem and travel allowance herein authorized and all other expenses incurred by the Committee shall be paid out of funds available to the Legislative Research Commission for

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expenses of the Interim Committees; provided, however, that the disbursements for all expenses incurred by the Committee, including the payment of per diem and travel allowances for members as herein authorized shall be approved by the chairman of the Commission.

APPENDIX D

Resolution of the Kentucky Un-American Activities Committee

WHEREAS, the past two years in the United States have been marked by extreme violence, riots, civil disorders and activities disruptive of domestic tranquilty, and

WHEREAS, such violence, riots and civil disorders have been characterized by the use of firearms, bombs and explosive devices by the participants resulting in the destruction of human lives and property, and

WHEREAS, such violence, riots and civil disorders have resulted in interference with firefighting operations, and have further resulted in looting and burning and other similar crimes of violence, and,

WHEREAS, this disease of violence, riots

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civil disorder, and disruptions of domestic tranquility has arisen in the Commonwealth of Kentucky, as evidenced by such lawlessness which has occurred within the borders of the state, and,

WHEREAS, such violence, riots, civil disorders, and activities disruptive of domestic tranquility constitute Un-American activities in that they fall beyond the traditional methods by which citizens of the United States and the Commonwealth seek redress for their grievances and solutions to their problems from their governments and in that they infringe upon rights of other citizens of the United States and of the Commonwealth,

NOW THEREFORE, Be It Resolved by the Joint Committee on Un-American

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Activities of the General Assembly of the Commonwealth of Kentucky.

1. That the Committee investigate and inquire into (1) the adequacy of the present laws of the Commonwealth relating to crimes involved in riots, civil disorders, and disruptions of domestic tranquility (2) the adequacy of present laws of the Commonwealth dealing with the powers and capabilities of law enforcement agencies and officers to control riots and civil disorders (3) the causes of riots, civil disorders and disruptions of domestic tranquility and the need for legislation to prevent such lawlessness in the future and (4) the adequacy of the present laws dealing with the sale and transfer of firearms.

2. That the Committee report its findings

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from the aforementioned investigations and its recommendations for legislation, if any is recommended, to the 1970 General Assembly, and to law enforcement agencies and commissions within the Commonwealth for their information and consideration.

June 21, 1968

APPENDIX E

Rules of Procedure of the Kentucky Un-American Activities Committee

I - INITIATION OF INVESTIGATIONS:

No major investigation shall be initiated without approval of a majority of the Committee. Preliminary inquiries, however, may be initiated by the Committee's staff with the approval of the Chairman of the Committee.

II - SUBJECTS OF INVESTIGATION:

The subject of any investigation in connection with which witnesses are summoned or shall otherwise appear shall be announced in an opening statement to the Committee or Subcommittee before the commencement of any hearings; and the information sought to be elicited at the hearings shall be relevant and germane to the subject so stated.

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III - SUBPOENAING OF WITNESSES:

A- Subpoenas may be issued under the signature of the Chairman of the Committee or any Subcommittee, or by any Member designated by any such Chairman, and may be served by any person designated by any such Chairman or Member.

B- Witnesses shall be subpoenaed at a reasonably sufficient time in advance of any hearing, said time to be determined by the Committee or Subcommittee, in order to give the witness an opportunity to prepare for the hearing and to employ counsel, should he so desire.

C- Each subpoena shall contain a statement notifying the witness that if he so desires a conference with a representative of the Committee prior to

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the date of the hearing, he may call or write the Chairman or Counsel of the Committee.

IV - EXECUTIVE AND PUBLIC HEARINGS:

A- If the Committee or a Subcommittee believes that the interrogation of a witness in a public hearing might endanger the rights of an individual or the security of the Commonwealth, it shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation in a public hearing.

B- Attendance at Executive Sessions shall be limited to Members of the Committee, its staff, and other persons who (sic) presence is requested, or consented to, by the Committee or Subcommittee.

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C- No testimony taken or material presented in an Executive Session, or any summary thereof, shall be made public either in whole or in part, unless authorized by a majority of the Committee.

D- Use of cameras and recording devices may be restricted or limited in an open hearing or during interrogation of a witness by a majority vote of the Committee. Witnesses may request the committee for such restriction at the beginning of his testimony.

V - TESTIMONY UNDER OATH:

All witnesses at public or executive hearings who testify as to matters of fact shall give all testimony under oath or affirmation. Only the Chairman or a Member of the Committee shall be empowered to administer said oath

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or affirmation.

VI - TRANSCRIPT OF TESTIMONY:

A- A complete and accurate record shall be kept of all testimony and proceedings at hearings, both in Public and in Executive Session.

B- Any witness or his counsel, at the expense of the witness, may obtain a transcript of any public testimony of the witness from the Counsel of the Committee.

C- Any witness or his counsel may also obtain, at his expense, a transcript of any executive testimony of the witness:

(1) When a special release of said testimony prior to public release is authorized by the Chairman with the approval of a majority of the Committee;

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(2) After said testimony has been made public by the Committee.

D- A witness examined under oath in a hearing shall, upon request, be given a reasonable opportunity before the transcript is made public to inspect the transcript of his testimony to determine whether it was correctly transcribed. He may be accompanied by his counsel during this inspection.

VII - ADVICE OF COUNSEL:

A- At every hearing, public or executive, every witness shall be accorded the privilege of having counsel of his own choosing.

B- The participation of counsel during the course of any hearing and while the witness is testifying shall be limited to advising said witness as

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to his legal rights. Counsel shall not be permitted to engage in oral argument with the Committee, but shall confine his activity to the area of legal advice to his client. At the conclusion of interrogation by the members of the Committee, counsel for the witness may inquire of his client to clarify any matters about which the witness has testified before the Committee, except that such inquiry may not go beyond the scope of the testimony given to the Committee. Time for such inquiry may be limited by the Committee to a certain length of time according to the time spent by the witness in testifying to members of the Committee and any questions to be made by counsel to his client shall be submitted in writing to

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the Committee for approval before such questions are asked.

VIII - CONDUCT OF COUNSEL:

Counsel for a witness shall conduct himself in a professional, ethical, and proper manner. His failure to do so shall, upon a finding to that effect by a majority of the Committee or Subcommittee before which the witness is appearing, subject such counsel to disciplinary action which may include warning, censure, removal of counsel from the hearing room, or a recommendation of contempt proceedings.

In case of such removal of counsel, the witness shall have a reasonable time to obtain other counsel, said time to be determined by the Committee or Subcommittee. Should the witness deliberately or capriciously fail or refuse to

obtain the services of other counsel within such reasonable time, the hearing shall continue and the testimony of such witness shall be heard without the benefit of counsel.

IX - STATEMENT BY WITNESS:

A- Any witness desiring to make a prepared or written statement for the record of the proceedings, in Executive or Public Sessions, shall file a copy of such statement with the counsel of the Committee not less than 48 hours in advance of the hearing at which the statement is to be presented.

B- All such statements or portions thereof so received which are relevant and germane to the subject of the investigation may, at the conclusion of the testimony of the witness, upon approval by a majority vote of the Committee or

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Subcommittee Members present, be inserted in the official transcript of the proceedings.

C- Conduct of witnesses before the Committee shall be the same as prescribed for counsel in Section VIII of these rules. Witnesses shall be subject to disciplinary action including warning, censure or action under Section XVII of these rules.

X - RIGHTS OF PERSONS AFFECTED BY A HEARING:

A- Where practicable, any person named in a public hearing, or in the released testimony of an executive hearing, as having been engaged in Un-American activities as defined by the investigations authorized and conducted by the Committee who has not been previously so named, shall, within a

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reasonable time thereafter, be notified by registered letter, return receipt requested, to the address last known to the Committee, of such fact, including:

(1) A statement that he has been so named;

(2) The date and place of said hearing;

(3) The name of the person who so testified;

(4) The name of the organization or activity with which he has been identified; and

(5) A copy of the printed Rules of Procedure of the Committee.

B- Any person, so notified, who believes that his character or reputation has been adversely affected may within 15 days after receipt of said

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notice:

(1) Communicate with the Counsel of the Committee; and/or

(2) Request to appear at his own expense in person before the Committee or any Subcommittee thereof in Public Session and give testimony, in denial or affirmation, relevant and germane to the subject of the investigation.

C- Any such person testifying under the provisions of B(2) above shall be accorded the same privileges as any other witness appearing before the Committee, and may be questioned concerning any matter relevant and germane to the subject of the investigation.

XI - ADMISSIBILITY OF TESTIMONY:

A witness shall be limited to giving information relevant and germane to

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the subject under investigation. The Committee or Subcommittee, through its presiding member, shall rule upon the admissibility of all testimony or information presented by the witness.

XII - COMMITTEE REPORTS:

A- No Committee reports, publications, or any summary thereof shall be made or released to the public without the approval of a majority of the Committee.

B- No summary of any Committee report or publication and no statement of the contents of such report or publication shall be released by any Member of the Committee or its staff prior to the official issuance of the report.

XIII - APPOINTMENT OF SUBCOMMITTEES - QUORUM - DELEGATION OF AUTHORITY:

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A- In addition to the general authority delegated to Subcommittees under the preceding section, each Subcommittee is delegated authority:

(1) To determine by majority vote thereof whether the hearings conducted by it shall be open to the public or shall be in Executive Session. All testimony taken and all documents introduced in evidence in such an Executive Session shall be received and given as full consideration for all purposes as though introduced in Open Session; and

(2) To admit to the hearing room whatever public information media it deems advisable or necessary to the dissemination of testimony, provided that the decision of the Subcommittee shall not be in conflict with the

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applicable rules of the General Assembly.

XV - PUBLICATION OF NAMES OF SUBPANAED (SIC) WITNESSES:

No member of the Committee or staff shall make public the name of any witness subpenaed before the Committee or Subcommittee prior to the date of his appearance.

XVI - WITNESS FEES AND TRAVEL ALLOWANCE:

Each witness who has been subpenaed, upon the completion of his testimony before the Committee, may report to the office of the Counsel of the Committee, State Capitol, Frankfort, Kentucky, and there sign appropriate vouchers for travel allowances and attendance fees upon the Committee. If hearings are held in cities other than Frankfort, Kentucky, the witness may

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contact the counsel of the Committee, or his representative, prior to leaving the hearing room.

XVII - CONTEMPT OF GENERAL ASSEMBLY:

No recommendation that a witness be cited for contempt fo the General Assembly shall be forwarded to the General Assembly unless and until the Committee has, upon notice to all its members, met and considered the alleged contempt, and by a majority of the Committee, voted that such recommendation be made.

XIX - DISTRIBUTION OF RULES:

All witnesses appearing before the Joint Legislative Committee on Un-American Activities shall be furnished a printed copy of the Rules of Procedure of the Committee.

June 21, 1968.

June Grand Jury Requests State Probe of City Riots

The June grand jury has called on the Kentucky Un-American Activities Committee to investigate aspects of last month's disorders here.

An interim report issued yesterday said that "a few signs point to a planned eruption." The report raised these questions which it said ought to be answered by a Kentucky Un-American Activities Committee inquiry:

- "How and for what purpose Samuel Hawkins and Robert Sims, leaders of the Black Unity League of Kentucky, are employed by the federal government?
- "The aim and purpose of the third-party element that continuously rears its head at every disruption?"
- "The connection, if any, of the third-party element with the recent civil disorders in Louisville?"
- "Who finances these organizations?"

State Rep. Lloyd Clapp, of Wingo, who is vice-chairman of KUAC, said today that he thought the committee would give "serious consideration to any recommendation by a grand jury." He said he thought it would be likely to come up at the committee's meeting in Frankfort tomorrow.

State Sen. Scott Miller Jr., of Louisville, was out of the city and could not be reached.

Sims and Hawkins have said previously, and the Federal government has confirmed, that they are employed by VISTA (Volunteers in Service to America), a Federal war-on-poverty organization patterned after the Peace Corps.

Washington sources have described their work as including the organization of black youths into groups to foster racial pride.

Although the report referred to "these organizations," grand jury foreman Orville E. Zoeller told a reporter later that the jurors were referring "more to a type of people" than any particular organization.

Asked specifically if the jury meant any one single group, Zoeller replied "not to my knowledge."

However, Commonwealth's Attorney Edwin A. Schroering Jr. said today that pursuant to the grand jury report he would turn over relevant files to the state committee. He said the files included information on various individuals and groups, whom he named.

New Construction Bricks Available

Signs that the disorders may have been planned include "owner identification signs on stores in the area surrounding 28th and Greenwood by noon of May 27, 1968," the report said. It also listed these other items:

"The availability of new construction bricks tossed from the roofs of buildings during the incident. The absence of old bricks which would have been used if the bricks had been taken from buildings in this area. The ready availability of water-filled bottles and water-filled light bulbs indicate that many came prepared."

The jury said it had "been asked by the Jefferson County Crime Commission to investigate the background of one James R. Cortez." It said it found little

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information available. But it said what was found showed "a history of violence and disobedience of the law, resulting in a record of 17 years of imprisonment during the last 23 years."

Cortez, Sims and Hawkins have been accused of engaging in a plot aimed at dynamiting West End oil storage facilities. All three spoke at the rally that preceded the outbreak of disorders on the night of May 27.

Crowd Estimated at 500 to 700

The report said that "the presence of only 500 to 700 persons at the rally, including approximately 200 people actively involved in the disruption, out of approximately 70,000 people, indicate to us that either many were completely disinterested or held the rally in complete contempt."

The 70,000 is an estimate of Louisville's Negro population.

And the report said that "after talking to some leaders of our minority group, we find that the speakers and organizers of this meeting are in complete opposition to a feeling held by those from whom we heard testimony."

And it asserted that "the police department was found to have had complete compassion on all those involved, and used force only when all other means had been exhausted."

On the general topic of race relations, the report said testimony "seems to indicate to us that the progress made between (blacks and whites) is and was coming along nicely."

It added, "Let us state here, that we realize that there is always room for more and faster progress to be made, and that we in no way wish to leave the impression that anyone or everyone is completely satisfied about every aspect of the progress made for the harmonious joining of these two groups."

Third Group's Actions Discussed

The report also included a discussion of the activities of a "third group," not otherwise identified, and its role in the civil-rights struggle. The passage says:

"However, throughout this entire investigation there continuously 'pecked around the corner' a third group of people, and this group seemed to be in the middle of every disruption or disorder. Bringing up questions which desperately needs further investigations, Why is a certain West-End organization doing sponsoring a student council at Louisville Male High School? Where are the funds going which were raised for the defense of James R. Cortez? How much money was raised? Why are certain minority leaders in complete distrust of other minority leaders?

"It seems to us that until the questions about how funds are used and a complete accounting of their disposition is made public, that all public and private donations should either be withheld or be contributed directly to the legitimate civil-rights organization through legal accounting methods, with the authority given for them to investigate the ultimate use of all said donations.

"We do not in any way wish to deter the expedience of these funds or to indicate that there should be any less effort to raise these funds. If any indication should be given, we would say that these monies are sorely needed, and the faster they can get to their legitimate end, the better. However, all precautions should be taken as to whom these monies are trusted."

Schroering said his office had information which it would turn over to the Kentucky committee on the following individuals and groups:

"Carl and Anne Braden and their associates;" the Southern Conference Educational Fund, Inc.; the West End Community Council; the Louisville Peace Council, the Black Unity League of Kentucky (BULK); the Student Non-Violent Coordinating Committee; the White Emergency Support Team (WEST); the Louisville Welfare Rights Organization; seminary students affiliated with the Southern Christian Leadership Conference; the Steering Committee against Repression; and the Angry White People in Defense of the Black Community.

Appendix G

Kentucky Un-American Activities Committee

FRANKFORT, KENTUCKY 40601
JOHN TIM McCALL
COUNSEL AND DIRECTOR

November 14, 1968

Mr. Carl Braden
4403 Virginia Avenue
Louisville, Kentucky 40211

Dear Mr. Braden:

Please be advised that your name was mentioned in the Hearing held before this Committee in Frankfort, Kentucky, on September 24, 25, 1968.

The following persons who testified at the Hearings mentioned your name: Detective Kenneth Newcomb, Robert Winlock and Captain John Hampton.

You were mentioned as being present at the rally at Zion Baptist Church on May 26, and the rally at 28th and Greenwood on May 27, 1968, in Louisville, Kentucky.

You have a right to appear before this Committee with your Attorney to defend yourself if you feel in any way maligned by any testimony given before this Committee.

Please have your Attorney contact me at his convenience in order that we may fix a time for your appearance before the Committee if you so choose.

Sincerely yours,

John Tim McCall

John Tim McCall
Counsel and Director

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 892

BLACK UNITY LEAGUE OF KENTUCKY, LOUISVILLE PEACE COUNCIL, SOUTHERN CONFERENCE EDUCATIONAL FUND, SOUTHERN SEMINARY STUDENTS AFFILIATED WITH THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, STUDENT NON-VIOLENT COORDINATING COMMITTEE, WEST END COMMUNITY COUNCIL, WHITE EMERGENCY SUPPORT TEAM - - - - - - - - - *Appellants*

Vs.

STATE SENATOR SCOTT MILLER, JR., Chairman and Member of Kentucky Un-American Activities Committee, STATE SENATOR CARL HADDEN, STATE SENATOR CLIFFORD LATTA, STATE SENATOR CHARLES UPTON, STATE SENATOR LAWRENCE W. WETHERBY, STATE REPRESENTATIVE LLOYD CLAPP, STATE REPRESENTATIVE HAROLD DEMARCUS, STATE REPRESENTATIVE THERON KESSINGER, STATE REPRESENTATIVE GEORGE MASSEY, and STATE REPRESENTATIVE FRED MORGAN, Members of Kentucky Un-American Activities Committee - - - - - - - - - - - *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION

MOTION TO AFFIRM

Come appellants and move the Court to affirm the judgment of the U. S. District Court for the Western

District of Kentucky on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

The Legislature of Kentucky at its 1968 session adopted a resolution creating a committee denominated as a "Joint Legislative Committee on Un-American Activities". The Resolution is correctly set forth in Appendix C of appellants' printed statement. Subsequently, the Governor of the Commonwealth of Kentucky appointed five members of the Kentucky House of Representatives and five members of the Kentucky Senate to be members of the Committee as required by the Resolution. These ten legislator-members of the Committee were made the defendants in this action. The Committee subsequently adopted a Resolution, (Appendix D, Appellants' Statement), and Rules of Procedure (Appendix E, Appellants' Statement). The complaint alleges that the Commonwealth Attorney of the 30th Judicial District has delivered to the Committee "information" concerning the plaintiffs (appellants) and that the Committee "intends imminently" to investigate the plaintiffs. In support of this allegation a clipping from a Louisville, Kentucky newspaper is attached as an exhibit to the complaint, (Appendix F, Appellants' Statement). The newspaper article reports a request by the Jefferson County Grand Jury to the Kentucky Un-American Activities Committee to investigate certain disorders which had occurred in the city of Louisville in May, 1968. The Grand Jury apparently did not name any particular organization or group, but the article does

report a statement of the Commonwealth Attorney that he would turn over to the Committee information on several organizations, some of which are plaintiffs in this action. One other circumstance is indicated by the inclusion of a letter printed as an appendix to appellants' statement. The letter is reproduced as Appendix G. It purports to be a letter from the Counsel and Director of the Committee addressed to Mr. Carl Braden, a person not a party to the action, informing him that three identified witnesses had mentioned his presence at several meetings in Louisville during the month of May, 1968, and informing him of his right to appear before the Committee if he so choose. This letter is dated November 14, 1968, and since the notice of appeal was filed on November 4, 1968, it is obviously not a proper part of the record on appeal.

Our purpose in the above outline is to indicate that the Kentucky Committee has not initiated any investigation which involves these plaintiffs or any other organization with similar alleged aims and purposes. Since the record clearly shows that the Committee has not in fact taken the slightest action to "deter, harass and intimidate" the plaintiffs, then their complaint must stand or fall on whether the Resolution of the Kentucky Legislature should be declared void on its face and its implementation enjoined to prevent irreparable injury to these particular plaintiffs.

ACTION OF THE DISTRICT COURT

The District Judge apparently certified the necessity for convening a three judge court to the Chief Judge of the U. S. Court of Appeals for the Sixth Circuit, based on the allegations of the complaint. The three judge court was constituted. Subsequently the

defendants filed a Motion to Dismiss on the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim. The defendants filed with their motion a memorandum of authorities which supported their motion. The plaintiffs made no response to the motion and did not file any memorandum of authorities or statement in opposition to the motion. The District Court pointed out in its second order that the rules of the U. S. District Court for the Western District of Kentucky require that a response to motions be filed not later than five days from receipt of the notice of motion. The motion and notice was filed on July 25, 1968. On August 26, 1968, the defendants filed a written motion to assign the pending motion to dismiss for hearing. On September 9, 1968, the District Court, by an order signed by the three designated judges, sustained the defendants' motion and dismissed the complaint.

Nineteen days after the entry of the final order dismissing the complaint the plaintiffs filed a motion "for Emergency Relief". The basis of the motion was the failure of the District Court to grant an oral hearing prior to ruling on the motion to dismiss. The District Court overruled the "emergency" motion pointing out that the plaintiffs had not responded to the defendants' memorandum in support of the motion to dismiss, and had not requested an oral hearing. It is apparent, at least to counsel, that the Court had reviewed the pleadings, and the authorities cited by defendants, and concluded that an oral hearing, previously requested by defendants, would not alter its determination to sustain the motion to dismiss.

THE QUESTION PRESENTED IS NOT SUBSTANTIAL BECAUSE PREVIOUS DECISIONS OF THIS COURT UPHOLD THE RIGHT OF A STATE TO INVESTIGATE IN THE AREA COVERED BY THE KENTUCKY RESOLUTION.

As pointed out in our statement the appellants' burden is to show that the Resolution is void on its face. Under previous cases decided by this Court the question of the right of a state to provide for investigation in the area described in the Kentucky Resolution has been upheld. For this reason the attack on the Kentucky Resolution does not present a question of substance.

This Court in the case of *Uphaus vs. Wyman, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090,* decided that the State of New Hampshire had a legitimate legislative interest in providing for investigations to determine the presence of subversive persons in the State. A subversive person was defined, by law, as a person who attempts to act, or advocates the commission of an act, intended to overthrow the government of the United States, the State of New Hampshire, or any political subdivision thereof, by force or violence. This investigatory authority is identical to the authority conferred on the Kentucky Committee by Section One of the Resolution. This Court not only sustained the State of New Hampshire's right to investigate in this area but specifically refused to proscribe the right because the Federal Government had by the Smith Act prohibited the advocacy of the overthrow of the Government of the United States by force and violence. It is our contention that Uphaus is such a conclusive answer to appellants' claim that the question presented is not of sufficient substance to justify further argument.

NO PERSON IS SUBJECTED TO HARASSMENT BY CRIMINAL PROSECUTION BY VIRTUE OF THE KENTUCKY RESOLUTION.

The appellants place their main reliance on the case of *Dombrowski vs. Pfister, 380 U. S. 479, 14 L. Ed. (2d) 22, 85 S. Ct. 1116 (1965).* In that case the authorities of Louisiana engaged in a long history of harassment of the Complainant, and criminal prosecutions were pending against him under the authority of a criminal statute which the Court held was void on its face. Under these concrete circumstances the Supreme Court directed the District Court to enjoin the state officials from further prosecution under the void statute. In *Dubois Clubs of America vs. Clark, 389 U.S. 309, 19 L. Ed. (2d) 546, 88 S. Ct. 450,* the Attorney General was in the process of a proceeding to require the complaining organization to register as a Communist-front organization. Prior to the hearing, required by law, the organization sought an injunction against any further action by the Attorney General. The organization placed its main reliance on Dombrowski vs. Pfister, supra; the Supreme Court denied relief and distinguished Dombrowski in the following language:

> In this case, the complaint and the affidavits constitute no more than conclusory allegations that the purpose of the threatened enforcement of the Act was to "harass" appellants and that the harassment was the intended result of the Attorney General's announcement that he had filed a petition with the SACB. Further, appellants are not being forced to assert their claims in a criminal prosecution.

The Dubois case furnishes a complete answer to whatever authority Dombrowski affords the appel-

lants in this case. The Dubois Club had been officially cited in a proceeding whose objective was to publicly denominate it as a Communist-front organization. These appellants have not been disturbed in any way by the Resolution or by any action taken under the authority of the Resolution, furthermore these appellants are "not being forced to assert their claims in a criminal prosecution".

THE DOCTRINE OF ABSTENTION SHOULD BE INVOKED.

The District Court in its memorandum opinion sustaining the motion to dismiss relied heavily on the doctrine of abstention as applied in the case of *Harrison vs. N.A.A.C.P., 360 U.S. 167.* There is sufficient ground to believe that the Courts of Kentucky will confine the authority granted to the Committee to areas and situations which would constitute completely permissible investigations from any and all constitutional viewpoints.

CONCLUSION

For the reasons aforesaid, it is submitted that the Court should sustain the appellees' motion to affirm.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

BLACK UNITY LEAGUE OF KENTUCKY ET AL. *v.* MILLER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 892. Decided March 3, 1969.

PER CURIAM.

Appellant organizations brought this suit for injunctive and declaratory relief against investigations which appellees, members of the Kentucky Un-American Activities Committee, were allegedly threatening to conduct. They contended that the investigations and accompanying contempt prosecutions would violate various rights, primarily those under the First and Fourteenth Amendments. They did not allege that any of their officers or members had been called as witnesses, or that any subpoenas had been issued, or that any criminal prosecutions had been begun. The allegations of harassment were entirely conclusory. Appellees moved to dismiss, and appellants failed to respond, as was required by local court rules. These rules also stated that "[f]ailure to respond may be good grounds for sustaining the motion." D. C. W. D. Ky. R. 5 (a). We hold that in this procedural context the trial court could take appellants' conclusory allegations as insubstantial and could dismiss the complaint for failure to allege sufficient irreparable injury to justify federal intervention at this early stage. For this reason, the motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS dissents.